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Progressive Electric, Inc. and International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL-CIO. Case 17-CA-18766R

March 31, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On November 18, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. Thereafter, on June 7, 2000, the National Labor Relations Board remanded this proceeding to the judge for issuance of a supplemental decision. On August 23, 2000, the judge issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel and the Charging Party filed cross-exceptions, supporting briefs, and answering briefs.¹

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to substitute a new order and notice for that recommended by the judge.²

¹ The Respondent has requested oral argument. The request is denied as the decision, supplemental decision, and briefs adequately present the issues and arguments in this case.

² The General Counsel requests that the Board reconsider its practice of awarding simple interest on back pay and seeks that interest on monetary awards be computed on a compounding daily basis. We find that the present case is an inappropriate vehicle to reconsider current policy and we shall, therefore, apply current Board precedent pertaining to the computation of interest. *Commercial Erectors, Inc.*, 342 NLRB No. 94 (2004).

When both a refusal to hire and a refusal to consider for hire violation are found, as here, the remedy for the refusal to consider violation is subsumed by the broader refusal to hire remedy. *Jobsite Staffing*, 340 NLRB No. 43 (2003). However, as we have found that only seven vacancies existed for the eight discriminatees, we shall order a refusal to consider remedy for the single discriminatee who, at compliance, is not instated. We shall also modify the recommended Order to include a provision requiring the Respondent to remove from its files any references to the unlawful refusals to hire and consider for hire.

Member Schaumber points out that the eight alleged discriminatees appeared en masse at Respondent's facility on March 29, 1996, after a Union executive board decision on March 26 to "batch" Respondent. They appeared armed with a video camera and tape recorder, and filmed Respondent's owner Neeman while they introduced themselves as union members seeking work. In Member Schaumber's view, such actions may be viewed as inconsistent with a genuine interest in obtain-

ing employment. For the reasons set forth by the judge, we find that the Respondent violated Section 8(a)(3) and (1) by refusing to consider applicants for employment, and by failing and refusing to hire them, because of their union affiliation.³

We also find, in agreement with the judge, that the Respondent violated Section 8(a)(1) by threatening the loss of employment if employees engaged in union activities and by threatening to close its facility if employees selected the Union as their bargaining representative.

However, we reverse the judge's findings that the Respondent violated Section 8 (a) (1) in the following respects.

Under extant Board law, however, that issue is largely irrelevant. In the absence of a three-member majority of the Board willing to revisit the parameters of applicant status under *FES*, Member Schaumber, for institutional reasons, applies existing precedent for the purpose of deciding this case. He agrees that under current Board law the judge properly found that Respondent violated 8(a)(3) and (1) by refusing to consider for hire and to hire certain individuals.

The judge also found that the Respondent changed its hiring procedures in violation of Sec. 8 (a)(3) and (1) when on March 29, 1996, the Respondent's president, Randy Neeman, falsely told applicants that they would be called in the future should a vacancy occur. Although Neeman's conduct supports the failure to consider and failure to hire violations because it tends to show an intention not to consider the applicants for employment, we find that Neeman's false representation was not a discrete "change" in hiring procedures violative of Sec. 8 (a)(3). We also find that the Respondent's placement of notices in its window indicating that applications were not being accepted and, subsequently, stating that applicants were to call Neeman were not discrete changes violative under Sec. 8 (a)(3) and (1). Each of these acts, together with the placing of blinds ads in the newspaper, were part and parcel of the Respondent's overall scheme to refuse to consider and hire union applicants. In our view, the cease and desist order, entered to remedy that overall violation, is sufficient to deter the repetition of all such conduct.

In finding that the Respondent unlawfully changed its hiring practices by implementing the use of "blind" newspaper ads, our dissenting colleague cites *Starcon, Inc.*, 323 NLRB 977, 982 (1997), *enfd.* in relevant part and remanded 176 F.3d 948 (7th Cir. 1999), and *Masiogale Electrical-Mechanical*, 331 NLRB 534 (2000), *affd.* after remand 337 NLRB 42 (2001), *enfd.* in part 323 F.3d 546 (7th Cir. 2003). The cases cited by our colleague are distinguishable. In *Starcon*, the employer responded to a union salting campaign by severely limiting the ability of volunteer union organizers to apply. Applications were accepted only on Mondays or Wednesdays between the hours of 10 a.m. and 2 p.m. and could only be submitted in person. The employer also routinely refused same day interviews to those who managed to submit applications, necessitating multiple trips to its offices in order to be considered for employment. Further, the employer, in effect, hired over the telephone an individual who did not identify himself as a union member, referring to the restrictive application rules as "only red tape." In *Masiogale*, the employer required an avowed union applicant to submit to an in person background check with a private detective during which he was questioned about his union background and affiliation. Subsequently hired nonunion employees were not subjected to this requirement.

No evidence of this character exists in this case. The "blind ad" procedure was not disparately applied to union applicants, and it did not limit the ability of any applicant to submit an application.

1. The judge found that the Respondent unlawfully solicited employees to distribute a letter in opposition to the organizing or “salting” efforts of the Union. During a meeting between employees and the Respondent’s president, Randy Neeman, employee David Richards asked Neeman if employees could write letters indicating their opposition to the Union. Neeman told the assembled group of employees that a single letter signed by everyone probably could be written, that he could neither encourage nor discourage such an endeavor, that employees should “keep me out of it” if a letter was written, and that the idea “sounds great.” Thereafter, employee Richards prepared a letter—signed by employees—indicating that the employees opposed the Union’s organizing efforts.

It is unlawful for an employer to coercively initiate or solicit a petition or letter opposing unionization. *Dentech Corp.*, 294 NLRB 924 (1989); *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). Contrary to the judge’s finding, however, the Respondent neither solicited nor initiated the antiunion letter. Rather, the notion of such a letter was initiated by employee Richards. Further, Neeman expressly and openly told Richards that he neither encouraged nor discouraged the letter and desired to be kept out of the matter. In this context, Neeman’s indication to Richards that he liked the idea does not render the discussion coercive. *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001); *Ernst Home Centers*, 308 NLRB 848 (1992). Accordingly, we shall dismiss this allegation of the complaint.⁴

Our colleague notes that Neeman told employees that if he (Neeman) were left out of any letter writing, “it would look a lot better”. We do not agree that this comment rendered Neeman’s conduct unlawful. Neeman realized that any involvement by him could be unlawful and thus it would be “better”, i.e. lawful, if he were not involved. We believe that Neeman, a nonlawyer, was simply reflecting his understanding of the legal situation in which he was thrust by virtue of the employee Richards’ question.

Our colleague also notes that Neeman said that Richards’ idea (for a letter) “sounded great.” In our view, Neeman was permitted, under Section 8(c), to express his antiunion opinion. This is particularly true where, as here, Neeman made clear that he was not even encouraging the idea of a letter.

⁴ Employee David Cousins testified that Respondent’s foreman, Don Hildreth, an agent of the Respondent, later told him that he could sign the letter if he so desired. We find this exchange insufficient to establish that the Respondent coercively solicited employees regarding the letter.

Finally, our colleague notes that Neeman suggested that a group letter might be more practical than individual letters. In our view, given the fact that the letter(s) would be wholly voluntary, we find nothing unlawful in Neeman’s practical suggestion.

2. In the meeting with employees noted above, president Neeman made reference to solicitations by Union representatives at or near the jobsite. The judge found that the Respondent unlawfully instructed employees to reject such solicitations. Contrary to the judge, we find that Neeman’s remarks on this subject were noncoercive.

In discussing the presence of Union organizers, Neeman initially told employees that “these guys [organizers] can come out and visit you during lunch and during your non working time” but that they’re not allowed to harass employees. He indicated that

if you want to listen to them, listen to ‘em, I don’t care. As long as you’re during your lunch or during your work break, fine go ahead. . . . do whatever you want. I can’t tell you not to, okay . . . They can walk on a job and do that. If you don’t want to listen, you can tell them to shove it and leave or you can get on . . . a hold of me.

Neeman told employees that they could tell organizers to leave them alone and that “once you say that, you come out and just say it, they’ll leave ya alone” but that “they have every right to come approach ya, but once you tell ‘em to stuff it, then they better leave you alone . . . they can’t follow ya around at lunch.”

In short, Neeman told employees to expect union solicitations at work and that it was up to employees if they wanted to talk to organizers during break time, but that they could tell organizers to leave if they so desired. We find nothing in Neeman’s remarks on this subject to be coercive. On the contrary, his remarks simply left with employees the decision whether or not to speak to union organizers—comments that cannot reasonably be construed as coercive in character.

Our colleague says that Neeman “instructed” employees to reject the Union solicitation, and that he told employees that they “should” tell Union representatives to “stuff it”. The evidence is to the contrary. Neeman told employees what the rights of the solicitors were, and told employees of their right to reject the solicitations. He told them that if they did so, the Union solicitors would back off. We find nothing unlawful in Neeman’s telling employees of the rights of solicitors and solicitees.

3. Neeman also discussed at this meeting the issue of wage increases. The judge found that Neeman’s statements unlawfully blamed the Union for the delay of annual reviews. We disagree.

Neeman told employees that he had consulted legal counsel regarding annual reviews, that he had to be careful about suddenly giving out raises “to try to encourage you to stay,” that things were held up initially because of these concerns (“I got cold feet”) regarding the Union, but that “we’re gonna do what we typically always do once a year.”

With regard to annual wage increases during an organizing campaign, employers are required, as a general rule, to proceed with benefits as if a union was not on the scene, that is, to maintain the status quo. *Martin Industries* 290 NLRB 857 (1988). In his remarks to employees, Neeman indicated his intention to maintain the status quo. Neeman prefaced his remarks by noting his concern about any appearance of undue “encouragement” regarding union matters but that the Respondent would maintain the status quo regarding wage increases. Neeman made it clear that he was acting in accord with the advice of legal counsel. The fact that the advice was premised on the Union campaign does not render Neeman’s remark unlawful. Although Neeman characterized the issue as “bullshit” in reference to the Union, we find that Neeman’s remarks, taken as a whole, did not coercively place the onus on the Union regarding the subject of wage increases. Indeed, Neeman emphasized that wage increases “are supposed to happen” and would happen as “we typically always do once a year.” In these circumstances, we find that Neeman’s remarks were not coercive.

Remedial Matters

At the compliance stage, the parties may introduce evidence as to how long a discriminatee would have worked for the Respondent if he had not been unlawfully refused hire. That evidence may lessen the backpay and may eliminate the instatement order. We do not pass, at this time, on these issues or on the respective burden of proof as to these matters.

ORDER

The Respondent, Progressive Electric, Inc., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of its facility if they select the Union as their exclusive collective-bargaining representative, and threatening employees with loss of employment if they engage in activities on behalf of the Union.

(b) Failing and refusing to consider applicants for employment and failing and refusing to hire them because of their Union affiliation.

(c) In any like related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) As determined in a subsequent compliance proceeding, instate Clinton Burge, Don Davids, Meryl Rich, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Rousan and Jim Pelley to the seven available positions for which they attempted to apply or, if those positions no longer exist, to substantially equivalent positions, and make them whole for losses sustained by reason of the discrimination against them, to be computed in the manner set forth in the remedy section of the judge’s supplemental decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire and consider for hire the above-named discriminates and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(c) Within 14 days from the date of this Order, notify, in writing, the above-named discriminatee, who in a compliance proceeding is not instated to one of the seven available positions, that any future job application will be considered in a nondiscriminatory way and notify the discriminatee, the Charging Party, and the Regional Director of future openings in positions that the discriminatee applied or substantially equivalent positions.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payments records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lincoln, Nebraska, copies of the attached notice marked “Appendix”⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Contrary to my colleagues, I would adopt the judge's findings that the Respondent violated Sec. 8 (a)(3) and (1) by placing "blind" advertisements for the discriminatory purpose of screening out Union applicants and violated Sec. 8 (a)(1) by soliciting employees to distribute a letter in opposition to the Union's organizing activities, by coercively instructing employees to reject Union solicitations, and by telling employees that wage increases were delayed because of the Union.¹

1. In April, May, and June of 1996, the Respondent for the first time ran "blind" newspaper ads that did not list its office address and effectively concealed its identity from prospective applicants. Previously, the Respondent's newspaper ads listed its address. This departure from previous practice occurred after the onset of Union activities. The Respondent furnished no business explanation at the hearing for this sequence of events. Accordingly, in the context of other unlawful conduct, I agree with the judge that this conduct was undertaken in

order to screen out Union applicants and, therefore, violated Sec. 8 (a)(3). *Starcon, Inc.* 323 NLRB 977, 982 (1997), *enfd.* in relevant part and remanded, 176 F.3d 948 (7th Cir. 1999).²

2. As the judge found, the Respondent held a meeting with employees on May 1, 1996. At the outset of the meeting, the Respondent's president, Randy Neeman, told employees that a Union adherent, who previously had announced that he was on strike and now wanted to return to work, was trying to cost employees their jobs and "that's why we have to put a stop to it." This statement unlawfully threatened employees with the loss of employment in violation of Sec. 8 (a)(1), as my colleagues agree.

In this context, Neeman went on to discuss the Union and, later in the meeting, was asked whether employees could write letters opposing the Union and standing behind the company. Neeman then suggested that employees could write one letter and have everybody sign it. He offered to furnish an address to send the letter, and he told employees to mail the letter. As Neeman explained to employees, this approach would "keep me out of it"³ and "it would look a lot better." Neeman went on to suggest that "if one of you guys want to get one of your wives to type up a letter and go around . . . and have everybody sign it," he would "verify" that employees could do that. Neeman then noted that although he couldn't encourage or discourage employees "because I want to stay separate," he rhetorically asked employees: "do I like the idea? I think it sounds great."

In my view, Neeman was not merely a passive character in this exchange, as the majority suggests. On the contrary, Neeman gave employees detailed instructions about the letter; he made it very clear that he was to be kept out of it only to surreptitiously make it "look better," and he told employees that an anti-Union letter

¹ I agree with my colleagues that the Respondent violated Sec. 8 (a)(3) and (1) by failing to hire and to consider applicants for employment because of their Union affiliation and violated Sec. 8 (a)(1) by threatening employees with the loss of employment and by threatening to close its facility if employees engaged in Union activities. In addressing the evidence that may be adduced in the compliance proceeding with respect to backpay and reinstatement, my colleagues cast doubt on current law. I would not revisit the issue settled by *Dean General Contractors*, 285 NLRB 573 (1987), as endorsed by the Board in *FES*, 331 NLRB 9, 14 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002).

² I find it unnecessary to consider other allegations that the Respondent unlawfully changed its hiring policies as they are cumulative to the alleged change in running "blind" ads. At minimum, as my colleagues agree, each of the acts found independently unlawful were part of the Respondent's overall scheme to refuse to consider and hire Union applicants. The placement of blind newspaper ads—after union organizing began—clearly was designed to screen out Union applicants who may have been seeking employment with the Respondent by making it impossible for them to know the identity of the employer offering the advertised positions. This is effectively no different than the hurdles to employment put in place by the employer in *Starcon, Inc.*, *supra*. See also *Masiongale Electrical-Mechanical*, 331 NLRB 534, 539 (2000) (employer unlawfully changed hiring policies to discourage union applicants by requiring applicants to be interviewed by a private investigator).

³ The majority relies on testimony that Neeman told the employers that he could neither encourage nor discourage this endeavor. However, rote disclaimers are not effective to negate unlawful conduct. See *e.g.*, *Lutheran Retirement Village*, 315 NLRB 103, 104 (1994).

“sounded great.” This was more than mere ministerial aid regarding the letter, and it occurred in a context of other unfair labor practices committed at the meeting. *Eastern States Optical Co.*, 275 NLRB 371 (1975). Accordingly, I would adopt the judge’s finding that the Respondent’s solicitation violated Sec. 8 (a)(1).

3. At the May 1 meeting just discussed, Neeman described the Union’s organizing tactics and told employees that they would not be “harassed out of your jobs” by the Union. Neeman stated that this was a “pattern” on the part of the Union, and he told employees that “you know all you gotta do, it’s simple. When somebody comes out and offers [you] a letter or says that a [Union] rep is gonna call you. . . just say I’ve had it, just leave me alone. . . . You got to say it though, okay. You gotta say it. . . . They have every right to come approach ya, but once you tell ‘em to stuff it, then they leave you alone.”

I find, in agreement with the judge, that the Respondent coercively instructed employees to reject Union solicitations. In the context of other unfair labor practices, as here, informing employees that the Union is trying to harass them out of their jobs and that employees, therefore, should tell Union representatives to “stuff it” sends a message that lawful Union activities will not be tolerated. This message was certainly reinforced by Neeman telling employees about the March 29 appearance of eight union applicants and his stating “that’s why the sign’s out in the door, says no applications taken.” Although the Respondent also told employees that they could either accept or reject Union solicitations if they so desired, that employees reasonably could not take this disclaimer at face value in this coercive context. See *Cordin Transport*, 296 NLRB 237, fn. 3 (1989) (soliciting opposition to the union violated Sec. 8 (a)(1) when solicitation occurred in coercive circumstances); *Lutheran Retirement Village*, supra at 315 NLRB 104.

4. Near the end of the May 1 meeting, Neeman brought up the issue of wage increases. Neeman stated that job reviews, which would lead to wage increases for some employees, were supposed to happen back in February. Neeman told employees “you know what, it got held up, why? Because of this bullshit. Because I gotta watch it, I can’t go all of a sudden start giving out raises for no reasons to encourage you to stay. So I got cold feet.”

I agree with the judge that the Respondent violated Sec. 8 (a)(1) by telling employees that their annual reviews were delayed. Although Neeman went on to tell employees that he had conferred with legal counsel and that wage increases would now happen as usual, he clearly linked the delay in granting wage increases to the onset of Union activities. Employees could reasonably

interpret Neeman’s remarks as putting the onus on the Union for lost wages between February and any prospective increases in the future. In this context, I find Neeman’s statement to be coercive. *Grouse Mountain Lodge*, 333 NLRB 1322 (2001) (statement placing blame on the union for delay of wage increase violated the Act).

Dated, Washington, D.C. March 31, 2005

Wilma B. Liebman, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closure of our facility or loss of employment if you select International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, as your exclusive collective-bargaining representative;

WE WILL NOT fail and refuse to consider applicants for employment, or to hire applicants for employment, because of their Union affiliation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights pursuant to Section 7 of the Act.

WE WILL make whole Clinton Burge, Don Davids, Meryl Rick, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Roussan and Jim Pelley for any losses they may have suffered by reason of our refusal to consider them for hire or our refusal to hire them and WE WILL offer instatement to any of them who would have been hired but for our unlawful refusal to consider them for hire and to hire them. If the positions for which they attempted to apply no longer exist, we will instate them to substantially equivalent positions. Instatement shall be without

prejudice to seniority or any other rights or privileges to which the discriminatees would have been entitled if we had not discriminated against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire and consider for hire the applicants listed above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL also notify, in writing, the applicant listed above who is not instated because of the absence of a job vacancy that any future job application filed by him will be considered in a nondiscriminatory way and WE WILL notify him of future vacancies.

PROGRESSIVE ELECTRIC, INC.

Lynette K. Zuch, Esq. counsel for the General Counsel.

William A. Harding, Esq., Margaret E. Stine, Esq. (Harding, Shultz & Down)s, of Lincoln, Nebraska, for the Respondent.

Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, counsel for the Charging Party

DECISION

STATEMENT OF THE CASE

Mary Miller Cracraft, Administrative Law Judge. This case was tried in Lincoln, Nebraska, on June 30 and July 1 through 3, 1997. The complaint as amended alleges that Progressive Electric, Inc. (Respondent) violated Section 8(a)(1) of the Act by interrogating, threatening, and soliciting employees, and Section 8(a)(1) and (3) of the Act by changing hiring procedures and failing to consider and hire applicants because of their activities on behalf of International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL-CIO (the Union). The underlying charge was filed by the Union on August 9, 1996,¹ and amended on September 18. The complaint issued on September 30 and was amended on May 13, 1997.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of counsel for the General Counsel, Charging Party, and Respondent, I make the following

¹ All dates are in 1996 unless otherwise referenced.

FINDINGS OF FACT²

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a corporation, is an electrical contractor in the construction business. During the 12-month period ending May 31, Respondent purchased and received goods and services valued in excess of \$50,000 directly from points outside the State of Nebraska. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent, a non-union, construction industry electrical contractor, was targeted by the Union for organizational purposes. Randy Neeman, president of Respondent, and his father Bill Neeman, secretary-treasurer of Respondent, maintain offices at 3420 N. 35th Street Circle in Lincoln, Nebraska. Respondent's office manager is Sharyn Newton. Prior to March, when Respondent required additional employees, it placed advertisements in the *Lincoln Journal Star*, the local newspaper, setting forth its street address and the hours it would be accepting applications. In addition, Respondent asked current employees to refer applicants and sometimes posted flyers. From February 3 to February 16, the following advertisement, typical of Respondent's practice, appeared in the *Lincoln Journal Star*:

ELECTRICIAN/ technician

must have two years exp in commercial wiring, conduit & controls,

exc indoor working cond. Vac., hol., & bonus.

Accepting applications. 8-4. M-F. 3420 N 35th St Cr

Jon Schafer, David Cousins,³ and Charles Randall responded at separate times to the advertisement. Each of them was given an employment application to complete and was hired by Respondent.

Alleged Interrogation

Randall's past association with the Union was apparent to Respondent at the time he was hired on February 13. Randall noted on his application that he had completed a Union apprenticeship and listed as past employers two unionized Detroit companies as well as a non-union employer in Waverly, Nebraska. Although the complaint alleges that Randy Neeman interrogated Randall during the employment interview, I do not find this violation. Rather, I credit the testimony of Randy Neeman.

² Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

³ Cousins was asked to apply for this job by the Union.

man that Randall himself initiated discussion of the Union and that Neeman did not ask Randall about his Union membership.⁴

On Tuesday, March 12, Respondent received notice from the Union that Randall was a member of the Union and would be engaging in organizing activities.⁵ After learning about opportunities to be referred from the Union's hiring hall, on Thursday, March 21, employee Dave Munsinger announced to other employees that he was joining the Union to get a better job. Munsinger quit on Friday, March 22, and was immediately referred to other work by the Union.

Alleged change in hiring procedures by failing to accept employment applications

On Friday, March 29, eight journeymen electricians went in mass to Respondent's facility equipped with a video camera and tape recorder. Each of them wore a Union jacket or cap.⁶ Randy Neeman arrived as the eight were disembarking from their automobiles. One of the eight, Jim Pelley, business manager and financial secretary of the Union, introduced himself to Randy Neeman and stated that the men were Union members who wanted to apply for employment. Randy Neeman asked the men to wait outside. When he did not return, the men went into the office and another of the eight, Bill Roussan, assistant business agent and organizer, told office manager Newton that the men were from the Union and would like to apply for work.

Randy Neeman appeared at this time and told the men that he was not hiring or taking applications. He stated that he had advertised several weeks prior to March 29 and had filled the openings. He concluded, "So I would love to put you all on and as soon as I get an opening I will give you guys a call." Pelley provided Randy Neeman with the names, addresses, and phone numbers of the eight men appended to a letter stating that they wished to be considered for employment. Randy Neeman testified that he had no intention of calling the discriminatees. He told them he would call them in order to get them out of his office and he threw away the list of names, address, and phone numbers as soon as they left.

Alleged Change in Hiring Practice by Posting Notices

On Tuesday, April 2, Respondent posted the following notice in its window:

Applications, as well as Names are
not being accepted at this time.
Video Cameras and recording devices
are prohibited.
Sales Reps. by appointment only.

⁴ This is a demeanor credibility resolution based upon the appearance of the two witnesses before me. Of the two, I found that Randy Neeman was able to recall the events with greater precision. His testimony regarding this conversation was straight forward and without embellishment.

⁵ A similar notice sent certified mail by the Union regarding Cousins was refused by Respondent on March 30.

⁶ At a Union meeting on March 26, it was determined that the executive board would "batch" on Respondent on March 29. The eight "batch" applicants included Jim Pelley, business manager and financial secretary; Bill Roussan, assistant business agent and organizer; Clinton Burge, president; Don Davids, recording secretary; Meryl Rich; Fred Munch; Robert Codr; and Jerry Chorowicz.

When accepting applications, Respondent placed a sign in its window stating

PROGRESSIVE ELECTRIC, INC.

Is now accepting applications for full-time apprentice electricians

for commercial and industrial wiring.

If interested, call 466-4222 and ask for Randy.

Progressive Electric is an Equal Opportunity Employer with excellent

wages and benefits.

Alleged Change in Hiring Practice by Placing Blind Advertisements

Respondent placed advertisements on April 18, May 31, and June 13 which for the first time limited the date for submission of resumes and described the positions in specific rather than general terms. This, despite the fact that Randy Neeman classified all employees, journeymen and apprentices, as electricians. Respondent's name and address were not divulged in the advertisements.

Alleged Failure to Consider and Hire

By letter of April 23, Pelley advised Respondent that the eight Union members continued to desire consideration for employment.⁷ Similarly, on June 24, Respondent was advised that the eight Union members continued to desire to be considered for employment and wanted information regarding any efforts which they must undertake in order to be considered for employment.⁸ A similar letter was submitted on July 19.⁹ The Union did not receive a response to these letters. There is no dispute that these letters were refused by Respondent and returned to the Union. I find, nevertheless, that Respondent received these letters by fax. Randy Neeman testified that he did not recall the letters. Despite this lapse of memory, I credit the testimony presented by the General Counsel regarding Respondent's receipt of the faxed letters.

On March 27, 1997, Respondent was advised that the eight Union members who had attempted to apply for work on March 29 continued to be interested in employment as journeymen or apprentice electricians. Although the Union received no response to its letters of April 23, June 24, and July 19, by letter of April 4, 1997, Respondent rejected the renewed request to file applications for employment stating it was not accepting applications at that time. None of the eight has ever been contacted or hired by Respondent.

Alleged Threat of Closure If Employees Select the Union

On April 8, while working at a jobsite at the University of Nebraska Dental College, job foreman Don Hildreth spoke to employees David Cousins and Don Schmidt stating that Randy Neeman had characterized Randall as the "bad apple in the barrel, and he [Randy Neeman] didn't want any union crap

⁷ The letter of April 23 was refused and returned. The letter was also transmitted by fax. The Union's records indicate the fax was sent and received at 3:41 p.m. on April 23.

⁸ The original letter dated June 14 was returned. The letter was transmitted by fax on June 24 and received by Respondent on that date.

⁹ This letter was also transmitted by fax.

around here.” Hildreth continued, “if the Unions got into Progressive, that Progressive would lose their [University of Nebraska at Lincoln] contracts, and they would go out of business . . . because they couldn’t afford the Union wages and benefits.” Assuming agency or supervisory status, this statement constitutes an unlawful threat to close the facility if employees select the Union as their exclusive collective-bargaining representative.¹⁰

Respondent contends that this statement is not attributable to it because Hildreth is not an agent or supervisor within the meaning of Section 2(11) or (13) of the Act. I find that Hildreth’s statement was attributable to Respondent. When Cousins began working for Respondent, Randy Neeman assigned Cousins to work with Hildreth whom Randy Neeman described as “running a few jobs for him.” Randy Neeman told Cousins that if Cousins had any questions, he should ask Hildreth. Randy Neeman described Hildreth’s duties as overseeing the projects. This manifestation by Respondent to employees created a reasonable basis for employees to believe that Hildreth was reflecting company policy and speaking for Respondent. See, e.g., *G M Electrics*, 323 NLRB 125, 128 (1997), and cases cited therein.

On April 26, Randall announced that he was officially on strike because Respondent would not pay him Union wages. Randall unconditionally offered to return to work on April 30. On May 1, after telling Randall that they were treating Randall’s “strike” of April 26 as a voluntary quit,¹¹ Randy and Bill Neeman met with the remaining employees.

Alleged threat of loss of employment for engaging in Union activities

Randy Neeman began the meeting by telling the assembled employees that Randall was trying, “to cost all you guys your jobs . . . and that’s why we have to put a stop to it.” This statement constitutes an unlawful threat of loss of employment if employees engage in activities on behalf of the Union. In relevant part, Randy Neeman continued, “we’re going to talk about this dirty word . . . UNION . . . okay! Let’s talk about unions. Are we for it, Bill and I? NO! Are you guys for it. I don’t want

¹⁰ I specifically reject Respondent’s argument that Hildreth’s statement is protected free speech pursuant to Sec. 8(c) which provides that expression of views, argument or opinion is not evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. Respondent’s argument ignores the obvious factual problem that Hildreth did not couch the statement as a matter of personal opinion. Moreover, Respondent has failed to show that the statement was based on objective facts. Accordingly the statement lacks any basis for constituting a mere analysis of the probable consequences of unionization. Respondent’s alternative argument, that there is no evidence that any employee was actually restrained or coerced by the statement, is misplaced. The statement has been evaluated in light of what a reasonable employee would have understood. This objective test, utilized by the Board, renders it unnecessary to probe the subjective feelings of each and every employee who was present. Whether the coercion succeeded or failed is irrelevant. Rather, if the conduct reasonably tended to interfere with the free exercise of Sec. 7 rights, taking into account the relevant factual context, a violation will generally be found.

¹¹ There is no allegation that this treatment of Randall violates the Act.

to know. Okay! I can’t ask ya, but I can give ya my opinion on it.”

Alleged instruction to rejection solicitations by the Union

Randy Neeman continued addressing the employees on May 1 by referencing harassment stating, “I don’t know if you guys know it. We had eight of ‘em show up out here with video cameras and they tried to get on, hire on out here. That’s why that sign’s out in the door, says no applications taken.” He continued, later that the Union might visit employees during lunch and during nonworking time but if employees were working, the employees could tell the Union, “to shove it and get out of there anytime you want.” He reiterated, “As long as you’re during your lunch or during your work break, fine go ahead . . . I . . . do whatever you want. I can’t tell you not to, okay. . . . If you don’t want to listen, you can tell them to shove it and leave or you can get . . . a hold of me. . . .” At a later point, Randy Neeman stated,

I already know what [the Union] is gonna throw at us. It’s a pattern. They’ve only got so much to work with and . . . that’s why I’m preparing you guys a little bit. . . . now you guys are not gonna get harassed out of your jobs. No way! You know all you gotta do, it’s simple. When . . . somebody comes out and offers ya a letter or say a rep. is gonna call you, a rep. is gonna send this, just say I’ve had it, just leave me alone. That’s it! Once you say that, you come out and just say it, they’ll leave ya alone. . . . You got to say it though, okay! You gotta say it. . . . They have every right to come approach ya, but once you tell ‘em to stuff it, then they better leave you alone.

These statements constitute unlawful instruction to employees to reject solicitations by the Union.

Alleged solicitation to distribute a letter in opposition to the Union

Employee Dave Richards asked Randy Neeman if the employees could write letters stating that they did not want to belong to the Union and give the letters to Randy Neeman indicating they were standing behind him. Randy Neeman responded,

If they’re individually wrote. You could probably have one letter wrote and have everybody sign it and I . . . don’t know, I . . . I would probably just soon give you an address and have one of ya mail it off . . . okay . . . to keep me out of it. It would look a lot better. . . . And I . . . I can’t encourage that or discourage that because I want to stay separate. Do I like the idea? I think it sounds great!

This constitutes an unlawful solicitation of employees to voice their opposition to the Union and to the Union activities of other employees in the form of a letter signed by all employees.¹²

¹² Employee David Richards prepared a letter on the day following this meeting stating that the employees of Respondent did not care for the Union and did not want letters from the Union or to be visited by the Union. The letter concluded, “Here is a list of co-workers and GOOD electricians that can and will VOTE the Union down.” The letter was signed by eight individuals including foreman Hildreth.

Allegedly informing employees that annual reviews were delayed due to Union activities

Randy Neeman then turned his attention to job reviews. He stated in relevant part,

... job reviews were supposed to happen in February . Okay, uhm, some got raises, some didn't get raises, all that good stuff and, you know what, it got held up, why? Because of this bullshit. Because I gotta watch it, I can't go all of a sudden start givin' out raises for no reasons to try to encourage you to stay. So I got cold feet. I didn't want to end up in court saying well god you guys you sent out and offered this money to these guys to stay and not join our organization. So I got legal counsel on that and since I have documentation, it is time and it is wrote up and it's supposed to happen. We can make it happen. So we're gonna do what we typically always do once a year. Uh, one on one. Now job reviews is where it's gonna be you come in, sit down and talk to Bill and I and tell us what you like, what you dislike.

These remarks constitute unlawfully informing employees that their annual reviews were delayed as a result of their activities on behalf of the Union.

Alleged threat of Bodily Harm for Engaging in Union Activities

On that same day, Cousins overheard Scott Johnson, Respondent's estimator and an avid recreational hunter, state to Hildreth and employee Joe Tyler that if he could get within a quarter mile of Randall he could take him out and Randall would never know what hit him. Johnson agreed that he made this statement but explained that in the context, the statement could only be understood as a joke and, in the worst case, as a threat of bodily harm to Randall because of his personal dislike for Randall and for Randall's work performance. I find that a reasonable listener would have understood the contextual nature of Johnson's statement. Accordingly, I find that the statement does not constitute a threat of bodily harm for engaging in activities on behalf of the Union. It is therefore unnecessary to determine the contested legal issue of whether Johnson is a supervisor or agent of the Respondent.

Analysis: Alleged Change in Hiring Practices and Failure to Consider and Hire

In order to demonstrate that Respondent changed its hiring procedures and failed to consider or employ the batch applicants in violation of the Act, the General Counsel must first, "persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decisions. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity." *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981),

Cousins testified that in fact Hildreth told him that the letter was in the office and if Cousins wanted to sign it, he could go to the office. This also constitutes soliciting employees to send a letter in opposition to the Union.

cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-404 (1983).

The parties disagree on the scope of the complaint allegation regarding change in hiring procedures. The complaint alleges that, "On or about March 29, 1996, Respondent changed its hiring procedure by failing and refusing to accept employment applications from applicants." It was initially clear to all parties that this allegation encompassed not only (1) refusal to allow the batch applicants to file applications on March 29 but also (2) the notice of April 2 stating that Respondent was not accepting applications. Following the close of General Counsel's case-in-chief, counsel sought permission to formally amend the complaint allegation to make it clear that the change in Respondent's advertising procedures of April, May, and June in which "blind" ads were utilized was also encompassed. I denied the motion to amend¹³ but admonished Respondent that General Counsel and Charging Party might nevertheless seek resolution of this issue on the merits by arguing that it was encompassed within the pleadings as closely connected to the existing allegations and fully litigated at the hearing. Additionally, I informed Respondent that if it required additional time in which to prepare a defense to these allegations, I would consider such a request. However, no such request was made.

Relying on my refusal to allow the formal complaint amendment, Respondent has moved to strike General Counsel's and Charging Party's briefs to the extent they contain argument regarding the April, May, and June "blind" ads. This motion is denied. Utilizing the two-part test cited by Respondent and General Counsel,¹⁴ I find that the change to "blind" ads is closely connected to the subject matter of the complaint¹⁵ and was fully litigated.¹⁶

¹³ General Counsel specifically amended the complaint prior to the hearing in order to conform the pleadings to the evidence which was anticipated. Although the complaint allegation regarding failure to accept employment applications could have been similarly clarified, General Counsel did not attempt to do so until after the close of its case-in-chief. When General Counsel announced that the April, May, and June "blind" ads were intended to be included within the scope of the allegation regarding change in hiring procedures, Respondent, understandably, expressed surprise. As this was the first mention that the "blind" ads were being litigated as a change in hiring procedures, I denied the motion as unjust.

¹⁴ *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), and *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.*, 920 F.2d 130 (2d Cir. 1990). There is no question that the allegation is additionally closely related to the underlying charge.

¹⁵ The complaint alleges change in hiring procedures on March 29 by failing and refusing to accept employment applications. There is no dispute that this allegation encompassed both the refusal to take employment applications on March 29 and the posting of a sign at Respondent's facility on or about April which stated that Respondent was not hiring and was not taking applications. The "blind" ads were also a change in hiring procedures. These ads were placed within a three-month period following March 29. There is, accordingly, a close connection between the allegation set forth in the complaint and the allegation regarding the "blind" ads.

¹⁶ For instance, Respondent was put on notice regarding the "clarification" of this allegation during testimony of its first witness. Although the formal motion to amend was denied, Respondent was aware that the issue would nevertheless be litigated as closely connected. Respondent

Turning to the merits of the change in hiring procedures allegations, I find there is ample evidence of activity, knowledge and animus,¹⁷ and, accordingly, conclude that General Counsel has persuaded that antiunion sentiment was a motivating factor in Respondent's change in hiring procedures regarding the batch applicants.

Respondent defends its alleged changes in hiring procedures by reference to its policy of not accepting applications when it is not hiring. There is, in fact, no evidence that Respondent was hiring. If Respondent had simply refused to take applications on March 29, there would not be a violation. However, Respondent did more. Respondent told the applicants that it would call them when openings occurred. This constituted a change in hiring procedures and had the effect of luring the applicants into complacency. Randy Neeman testified that even as he spoke those words, he had no intention of contacting the applicants. In fact, he told them he would call them in order to get them out of his office and he threw away the list of their names, addresses, and phone numbers immediately.

Respondent defends its actions by reference to the video camera which the alleged discriminatees brought to Respondent's facility. Respondent claims that trade secrets might be made available to competitors through video camera surveillance and, additionally, Randy Neeman claimed that his father, Bill Neeman, was in fragile health due to a heart condition and he was concerned that the video cameras would upset his father. Respondent's evidence fails to convince me that its actions were not motivated at least in part by anti-union sentiment. No specific trade secrets were enunciated and Bill Neeman's composure on the video appears friendly and without evidence of nervousness or upset. Accordingly, I find that Respondent changed hiring procedures on March 29 by telling the prospective applicants that they would be called when a vacancy occurred at least in part because of the Union activity of the alleged discriminatees.

Following the events of March 29, Respondent placed a sign in its window stating that applications and names were not being accepted. When hiring, a different sign advised applicants to telephone Randy Neeman. This constituted a change in hiring practices in that no signs had been present prior to March 29 and it was previously unnecessary to telephone Randy Neeman in order to file an application during periods of time when Respondent was accepting applications. As noted, the record indicates substantial animus toward the Union. Moreover, Randy Neeman specifically told employees that the signs were the result of the eight batch applicants appearing with video cameras and a recording device. I find that this change in hiring procedures was motivated in part by a desire to screen out Union applicants. Accordingly, I find the changes violative of Section 8(a)(1) and (3) of the Act.

presented evidence and cross examined witnesses regarding this conduct. Under these circumstances, the issue has been fully litigated.

¹⁷ In addition to the Sec. 8(a)(1) statements already found, I note that Randy Neeman referred to the Union as a "bunch of dummies" and used the phrase, "Mr. Asshole Union Rep.," when addressing assembled employees.

Respondent also changed its advertising practice by placing "blind" ads in April, May, and June which specifically limited the dates when applications would be accepted and concealed Respondent's identity. There is no evidence of any business reason for this change. Under the circumstances, I find that this change was made in order to screen out Union applicants.

In addition, I find that General Counsel has persuaded that antiunion sentiment was a motivating factor in Respondent's failure to consider the eight batch applicants for employment. Certainly, the Union membership of these applicants was well advertised. Respondent's animus for the Union is replete in the record. Randy Neeman told the batch applicants that they would be considered when he had work. The batch applicants renewed their request to be considered but Respondent thereafter hired other applicants. There is no evidence that Respondent considered the eight batch applicants. Respondent claims the batch applicants were not considered because it retains applications for only 45 days. Whether or not this is true is irrelevant as these applicants were not allowed to file applications and were specifically told they would be considered when the Respondent had vacancies.¹⁸ Moreover, the Union renewed its request for employment during periods of time when "blind" ads were advertising vacancies.¹⁹ Because I reject Respondent's reasons for refusal to consider the applicants, I find that Respondent has violated Section 8(a)(1) and (3) by failing to consider the applicants for employment. Cf., *Delta Mechanical*, 323 NLRB 76, 81 (1997) (failure to consider applicant was consistent with uniformly applied policy of refusal to accept applications unless the company was hiring); *Industrial Construction Services*, 323 NLRB 1037 (1997) (no violation in failure to consider 17 job applications faxed to company when company's express and uniformly applied policy prohibited consideration of faxed job application).

Respondent defends failure to hire the "batch" applicants on various grounds including (1) an assertion that Pelley and Rou-sann had not worked recently with their tools and therefore were not qualified applicants; (2) the testimony of alleged discriminatee Chorowicz that he would have to know what job was being offered before he could decide whether he would accept an offer; and (3) the assertion that five of the eight applicants were not truly available for work because they were employed elsewhere and Respondent's policy would have precluded hiring them away from their current employers.²⁰ Be-

¹⁸ On February 20, Jerry Hiestand applied for work. He was not hired at that time. However, he was hired on May 17 as an HVAC installer after responding to a "blind" ad. His prior application had been retained in Respondent's files. Accordingly, were it necessary to examine this defense on the merits, I would not find it uniformly applied.

¹⁹ Specifically, a blind ad was placed on April 18 limiting submission of resumes through May 1. On April 23 the Union expressed continued interest in employment on behalf of the eight "batch" applicants. A "blind" ad on May 31 was followed by a letter of June 14 from the Union. The "blind" ad of June 13 was followed by a letter of July 19. Although neither the June 14 or July 19 letters arrived within the time limits set in the "blind" ad, the June 14 letter was timely for the June 13 ad.

²⁰ Many employees of Respondent were employed by other employers at the time Respondent hired him. Accordingly, the record does not indicate uniform application of this policy.

cause Respondent did not consider any of these applicants, the remedy herein will require that they be considered. If it is determined in a subsequent compliance proceeding that Respondent would have hired any of the applicants it refused to consider, these arguments may be relevant. However, at this stage of the proceedings, the arguments are premature. See, e.g., *B E & K Construction Co.*, 321 NLRB 561 (1996); *Refrigeration Systems Co.*, 321 NLRB 1085 (1996); *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995).

CONCLUSIONS OF LAW

1. By threatening employees with closure of its facility if they selected the Union as their exclusive collective-bargaining representative, threatening employees with loss of employment if they engaged in activities on behalf of the Union, soliciting employees to speak to other employees in opposition to the Union, instructing employees to reject solicitations by the Union, soliciting employees to distributed a letter in opposition to the Union and union activities of other employees, and suggesting the form of this communication, and informing employees that their annual reviews were delayed as a result of their activities on behalf of the Union the Respondent has violated Section 8(a)(1) of the Act.

2. By changing its hiring procedures and by failing and refusing to consider the eight "batch" applicants for employment and to employ them, the Respondent has violated Section 8(a)(3) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent will be ordered to consider for employment and to hire Clinton Burge, Don Davids, Meryl Rich, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Roussan, and Jim Pelley. Those discriminatees whom Respondent would have hired for job openings that existed from March 29, 1996, to date, shall be made whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Questions concerning the number of jobs that would have been available during the period of discriminatory conduct and the use of remedial preferential hire lists are reserved for determination in the compliance phase of this proceeding. *Starcon, Inc.*, 323 NLRB 977 (1997); *B E & K Construction Co.*, 321 NLRB 561, 562 (1996); *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

1. Cease and desist from

(a) Threatening employees with closure of its facility if they select the Union as their exclusive collective-bargaining representative, threatening employees with loss of employment if they engage in activities on behalf of the Union, soliciting employees to speak to other employees in opposition to the Union, instructing employees to reject solicitations by the Union, soliciting employees to distribute a letter in opposition to the Union and union activities of other employees, and suggesting the form of this communication, and informing employees that their annual reviews were delayed as a result of their activities on behalf of the Union.

(b) Changing its hiring procedures by refusing to allow submission of applications by telling prospective applicants they will be contacted for future vacancies, by requiring telephone contact prior to taking an application and by placing blind ads concealing its identity and limiting the time for filing of applications and failing and refusing to consider applicants for employment and failing and refusing to employ them because of their Union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Consider for hire Clinton Burge, Don Davids, Meryl Rich, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Roussan and Jim Pelley and make whole those whom the Respondent would have hired for any losses sustained by reason of the discrimination against them as set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Lincoln, Nebraska, copies of the attached notice marked "Appendix."²²

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated November 17, 1997, San Francisco, CA

adopted by the Board and all objections to them shall be deemed waived for all purposes.

²² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize;
- To form, join, or assist any union;
- To bargain collectively through representatives of their own choice;
- To act together for other mutual aid or protection;
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with closure of our facility or loss of employment if you select International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL-CIO, as your exclusive collective-bargaining representative; WE WILL NOT solicit you to speak to other employees in opposition to the Union or to distribute a letter in opposition to the Union; WE WILL NOT instruct you to reject solicitations by the Union; and WE WILL NOT tell you that we have delayed your annual reviews because of activities on behalf of the Union.

WE WILL NOT change our hiring procedures by refusing to allow you to file an application but telling you we will call you when a vacancy occurs, by requiring telephone contact prior to taking an application, and by placing blind ads concealing our identity and limiting the time for filing of applications and WE WILL NOT fail and refuse to consider applicants for employment or to employ applicants because of their Union affiliation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights pursuant to Section 7 of the Act.

WE WILL make whole Clinton Burge, Don Davids, Meryl Rich, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Roussan and Jim Pelley for any losses they may have suffered by reason of our refusal to consider them for hire; and WE WILL offer employment to any of them who would currently be employed but for our unlawful refusal to consider them for hire or to substantially equivalent positions if those jobs no longer exist, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

Lynette K. Zuch, Esq., for the General Counsel.

William A. Harding, Esq., Margaret E. Stine, Esq. (Harding, Shultz & Downs), of Lincoln, Nebraska, for the Respondent.

Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case is before me on remand from the Board. Originally, the case was tried in Lincoln, Nebraska, on June 30 and July 1 through 3, 1997. On November 17, 1997, I issued my decision finding that Progressive Electric, Inc. (Respondent) violated Section 8(a)(1) of the Act by interrogating, threatening, and soliciting employees, and Section 8(a)(1) and (3) of the Act by changing hiring procedures and failing to consider and hire applicants because of their activities on behalf of International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL-CIO (the Union).¹

Thereafter, timely exceptions and cross-exceptions were filed. On May 11, 2000, the Board issued *FES*, 331 NLRB 9 (2000), setting forth a framework for analysis in refusal-to-hire and refusal-to-consider cases. By order of June 12, 2000, the Board remanded this case to me for further consideration in light of *FES*. By order of June 22, 2000, I requested that the parties herein set forth their positions regarding the remand, the impact of *FES* on the facts of this case, and their respective positions regarding whether the 1997 record was sufficient to decide the issues presented.

The parties submitted written position statements regarding these matters. All parties agree that the 1997 record is sufficient to decide the issues on remand. On the entire record, including my observation of the demeanor of the witnesses,² and after considering the position statements on remand filed by all counsel, I make the following

FINDINGS OF FACT

I. FRAMEWORK FOR ANALYSIS

A. Refusal to Consider

In *FES*, the Board set forth the following elements of a discriminatory refusal to consider violation:

To establish a discriminatory refusal to consider, . . . the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that anti-union animus contributed to the decision not to consider the applicants for employment.³

Once the General Counsel shoulders the initial burden in a refusal-to-consider case, the burden shifts to the respondent, "to show that it would not have hired the discriminatees to fill

¹ The underlying charge was filed by the Union on August 9, 1996, and amended on September 18, 1996. The complaint issued on September 30, 1996, and was amended on May 13, 1997.

² Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

³ *FES*, *supra* at 15.

those openings even in the absence of its earlier refusal to consider them on the basis of their union activity or affiliation.”⁴

B. Refusal to Hire

The Board set forth the elements of a discriminatory refusal-to-hire violation as follows:

To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire applicants.⁵

Once the General Counsel sustains the initial burden in a refusal-to-hire case, “the burden will shift to Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

II. ORIGINAL DECISION

In my original decision, I found, *inter alia*, that Respondent had violated the Act by failing to consider eight “batch” applicants for employment. The conclusion of law recited, “By changing its hiring procedures and by failing and refusing to consider the eight ‘batch’ applicants for employment and to employ them, the Respondent has violated Section 8(a)(3) of the Act.” The proposed remedy stated, “Specifically, Respondent will be ordered to consider for employment and to hire [the eight ‘batch’ applicants].” Respondent’s defenses to failure to hire were rejected:

Because Respondent did not consider any of these applicants, the remedy herein will require that they be considered. If it is determined in a subsequent compliance proceeding that Respondent would have hired any of the applicants it refused to consider, these arguments may be relevant. However, at this stage of the proceedings, the arguments are premature.

III. ARGUMENT ON REMAND

A. Counsel for the General Counsel

Counsel asserts that the original decision found and the record evidence reflects that Respondent excluded the eight batch applicants from the hiring process and that antiunion animus contributed to the decision not to consider these applicants for employment. Moreover, counsel asserts that Respondent did not prove that it would not have considered the applicants even in the absence of their union activity or affiliation. Counsel notes that Respondent’s claim that it only retained applications for 45 days was rejected because it was not uniformly applied. Moreover, counsel points to the Union’s renewal of the re-

quests for consideration for employment throughout the relevant period. Counsel asserts that the appropriate remedy based upon these findings is a cease and desist remedy and a requirement that the discriminatees be considered for future openings in accord with nondiscriminatory criteria. Counsel also requests an order notifying all parties of future openings.

With regard to the failure to hire allegation, counsel for the General Counsel notes that the record credibly reflects that Respondent was hiring because it hired eight employees between May 17, 1996 and March 10, 1997. Counsel asserts that all of the batch applicants were experienced journeymen electricians with state and city electrical licenses and were qualified for the announced vacancies. Counsel asserts that the record is replete with examples of antiunion animus and that the original decision correctly found that antiunion sentiment was a motivating factor in Respondent’s treatment of the batch applicants. Counsel avers that Respondent did not show that it would not have hired the applicants even in the absence of their Union activity. Counsel notes that applicants with inferior qualifications were, in fact, hired. Counsel also asserts that Respondent has failed to show that any of the applicants were not qualified for specific positions. Counsel seeks a cease and desist order and an order offering the eight discriminatees immediate reinstatement to the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, as well as a make-whole remedy.

B. Charging Party

Counsel for the Charging Party notes that the original decision already finds that Respondent excluded the “batch” applicants from the hiring process and that antiunion animus contributed to the decision not to consider these applicants. Counsel requests that the discriminatees be instated with backpay to openings arising during or after the hearing. As to refusal to hire, counsel asserts that the record amply demonstrates that Respondent was hiring, or had concrete plans to hire, at the time of the unlawful conduct. Counsel argues that the record reflects that the eight applicants had the experience or training relevant to the announced or generally known requirements. Finally, counsel requests that in the event a finding is made that there was not an opening for all of the applicants, the compliance hearing should be used to determine which of the applicants should have been hired for the available openings.

C. Respondent

Counsel for Respondent asserts that this is solely a refusal to hire case. Counsel contends that the complaint, as amended, does not allege refusal to consider. As to refusal to hire, Respondent argues that counsel for the General Counsel did not meet the burden of proving that Respondent discriminatorily refused to hire the eight applicants. Respondent notes a finding in the original decision that there was no evidence that it was hiring on March 29 when it refused to take applications from the eight alleged discriminatees. Counsel argues, moreover, that Respondent kept applications on file for 45 days only and there is no evidence of any job openings within the 45-day period following March 29. In addition, Respondent denies that it

⁴ *FES*, supra at 17.

⁵ *FES*, supra at 12 (footnotes omitted).

received any letters from the Union renewing interest on the part of the applicants for future job openings.

Counsel also contends that there is insufficient evidence to prove that the applicants were qualified for any open positions. Counsel notes that two of the eight applicants had not worked with the tools of the trade since assuming positions in the Union. Moreover, Respondent advertised for ladder rack installers in May and June 1996, and for apprentices in the spring of 1997. These positions paid far less than typically earned by a journeyman electrician. Respondent asserts its right to refuse to hire applicants who are overqualified for its open positions.

IV. ANALYSIS ON REMAND

A. General Counsel's Initial Burden—Refusal to Consider

The amendment to the complaint dated May 13, 1996, alleges at paragraph 6(b) that, "Respondent has failed and refused to consider for employment and to employ the following employee-applicants for employment. . . ." "It is clear, accordingly, that the pleadings encompass not only a refusal to hire allegation but also a refusal to consider allegation. I reject Respondent's argument to the contrary. Consistent with my findings in the original decision and in agreement with counsel for the General Counsel and counsel for the Charging Party, I find that Respondent excluded the eight applicants from the hiring process and that antiunion animus contributed to the decision not to consider the applicants for employment.

B. General Counsel's Initial Burden—Refusal to Hire

There is no evidence that Respondent was hiring or had concrete plans to hire on March 29 when the eight applicants presented themselves for hire. However, I have previously found that Respondent told the applicants that they would be considered for future openings and that the Union renewed the applicants' request to be considered for future employment by letters or faxes of April 23, June 24, July 19, 1996, and March 27, 1997. During this period, Respondent hired eight employees: one HVAC/Energy management system installer, three ladder rack installers, one apprentice electrician, and three electricians. Based upon this evidence, I find that Respondent had concrete plans to hire electricians and apprentice electricians during the period from March 29, 1996, through March 27, 1997, the same period of time that the eight applicants expressed interest in employment with Respondent.

Moreover, I find that the eight batch applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. Each of them was a licensed journeyman electrician capable of performing general electrical work, HVAC installation and ladder rack installation. Seven of the eight applicants were graduates of an IBEW 4-year apprenticeship program⁶ and all were licensed as journeymen electricians by the State of Nebraska. Consequently, I find that each of the applicants had the experience or training relevant to the announced and generally known requirements of

each of the openings.⁷ Finally, I have previously found that antiunion animus contributed to the decision not to consider the applicants for hire and I find that it extended to refusal to hire these applicants as well.

C. Respondent's Burden—Refusal to Consider and Refusal to Hire

Whether defending refusal to hire or refusal to consider, Respondent's burden is to show that it would not have hired the applicants even in the absence of their union activity. The Board further explained,

If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.⁸

Respondent asserts that it would not have hired the applicants in any event, even in the absence of their Union activity. Specifically, Respondent asserts that some of the applicants did not possess the specific qualifications the position required and as to others, that those hired were better qualified for the particular jobs. Respondent notes that two of the applicants had not worked as electricians for a number of years.⁹ Respondent also notes that one of the alleged discriminatees admitted that he might not have taken a job with Respondent depending on the pay which was offered. Finally, Respondent asserts that some of the applicants were overqualified for the jobs it filled.

1. HVAC/Energy management system installer

On May 17, 1996, Respondent hired Jerry Hiestand in response to its April 18, 1996, advertisement for "HVAC/EMS Installers/Programmer, min 4 yrs experience." Hiestand possessed a State of Nebraska Class A Electrical License. He listed his prior employment as journeyman electrician 1992–1996 and electrical technician 1989–1992. The resume which he submitted with his application for employment with Respondent indicates that his current position involved HVAC/Energy Management System installation, commissioning, programming, and customer training for commercial control systems. His resume further explained that his experience with systems included Johnson Controls, Landis & Gyr, Air Link, Climate Master and company-engineered systems. Hiestand was hired at a rate of \$13.75 per hour as an energy management systems technician.

⁷ See *GM Electrics*, 323 NLRB 125, 128 fn. 13 (1997), cited with approval in *FES*, 331 NLRB at 12–13.

⁸ *FES*, supra, 331 NLRB at 12.

⁹ Jim Pelley, business manager and financial secretary of the Union, had not worked on a jobsite since June 1987 and assistant business agent and organizer William Roussan had not worked as a journeyman electrician since September 1995.

⁶ Roussan is the only exception to this statement. However, he was licensed and worked as a journeyman electrician for 30 years at the time of his application.

Respondent hired Hiestand in anticipation of being awarded a contract with University of Nebraska to perform energy management system installation. Prior to hiring Hiestand, Respondent did not have any personnel specifically trained in the area of energy management system installation or operation, or specifically trained in motor control or programmable logic controllers. Respondent's president Neeman explained that he wanted an employee who knew this field, "like the back of their hand" rather than someone with only sporadic experience in the area. In Neeman's view, the job required skills and experience or training over and above that of a licensed journeyman electrician.

Although Respondent was eventually the lowest bidder on the University contract, Respondent was notified by letter of June 14, 1996, that the University would not be awarding the contract after all. Hiestand worked until July 9, 1996, and then quit. He was not replaced because the position was created in anticipation of a contract with the University which, "did not work out."

While the General Counsel and the Charging Party assert that any of the eight applicants possessed qualifications superior to those of Hiestand, Respondent contends that it would not have hired any of the eight applicants in any event because Hiestand had superior qualifications. The record reflects that while the eight applicants were able to competently study blueprints to determine where motors for HVAC and other equipment should be placed, were able to install power feeds and control wiring systems, and occasionally read technical manuals describing the functioning of such pieces of equipment in order to connect power properly to such systems, none of the eight applicants had 4 years of experience installing, programming, commissioning and training customers on such systems. I find that Hiestand had such experience¹⁰ and accordingly, in agreement with Respondent, find that it would not have hired any of the eight applicants for this position even in the absence of their Union support or activity.

2. Ladder rack installers

On May 31 and June 13, 1996, Respondent placed advertisements for "LADDER RACK Installer. Good carpentry skill required." Neeman explained that he wanted good carpentry skills to ensure installation in a neat and orderly fashion. He described "ladder rack" work as "hard and dirty work." Three employees were hired to perform this work. Christopher Stuart was hired on June 10, 1996, as a ladder rack installer earning \$7.50 per hour. His prior experience included insurance sales and store manager at a video rental store. Mike Standley was employed on June 20, 1996, as a ladder rack installer with an initial rate of \$7 per hour. His prior experience included plumbing and Keno writing. Curtis Williams was hired on June 24, 1996 as a ladder rack installer earning \$7 per hour. His prior experience was radiological controls shift supervisor.

Each of the eight applicants was able to plan and install raceway systems. Cable trays or ladder racks are a component of these systems. Each of these applicants could calculate the

necessary bends, saddles and offsets needed to install conduit in the system. Each of them could plumb and level the system and cut holes in concrete, if necessary, to run the conduit through the system. In addition, Roussan worked as a carpenter while in the Army and in 1996, he built a new house and a dog kennel. None of the successful applicants had any prior experience with "ladder rack" installation or carpentry.¹¹ I find that Respondent has failed to prove that those hired had superior qualifications to the applicants. Because the number of qualified applicants (8) exceeds the number of available jobs (3), a backpay and installment remedy is appropriate for 3 of the applicants. The compliance proceeding is the appropriate forum for determining which of the 8 applicants must be offered backpay and installment.¹²

Respondent argues that it was privileged to reject the 8 applicants on the basis of overqualification. This argument is presumably directed to the ladder rack positions and perhaps to the apprentice electrician positions. Respondent's president Randy Neeman testified that he had indeed rejected the application of Jerry Hiestand for previous electrician vacancies because Hiestand was overqualified for these positions. Hiestand applied for work on February 20, 1996. Charles Randall and Jon Schafer were hired on February 20, 1996, while David Cousins and Don Virts were hired on March 4, 1996. Randall, Schafer and Cousins had journeyman electrician certification and at least 4 to 12 years experience in the field.¹³ Hiestand's application is comparable to those of Randall, Schafer, Cousins and Virts and, I conclude that he was not rejected due to "overqualification." Rather, it appears that his experience was somewhat specialized in the controls area. Respondent was planning to bid on a contract in this area for the University and held Hiestand's application for future reference based on his specialized background. Accordingly, I reject Respondent's argument regarding "overqualification" as a basis for rejection because the argument is not based upon Respondent's past conduct.

3. Apprentice electrician—May 27, 1996

From March 22, 1996 to May 26, 1996, Respondent utilized the services of Steve Baumli as a contract "apprentice electri-

¹¹ None of the applications or resumes of the successful applicants refers to any carpentry experience. Neeman thought that Stuart might have mentioned carpentry experience during their interview but he was somewhat uncertain about this. Moreover, Neeman agreed that Stuart probably did not know what a ladder rack was at the time he was hired. Neeman's uncertainty regarding this fact diminishes the probity of his testimony. Consequently, I am unable to find that Stuart had superior carpentry skills to those of the 8 unsuccessful applicants. Neeman could not recall whether Standley or Williams mentioned any carpentry skills during their interviews. Moreover, I note that Respondent's advertisements were "blind," and could potentially have been worded to obfuscate the identity of the employer. Neeman's explanation regarding the need for carpentry skills in ladder rack installation was somewhat weak and I discount the carpentry requirement on that basis.

¹² See *FES*, 331 NLRB at 14.

¹³ Cousins' application indicates 12 years experience in electrical or maintenance work. Randall's application indicates 4 years experience as well as completion of 4 years joint apprenticeship training. Schafer's application indicates 4 years of electrical work.

¹⁰ In making this finding, I have not relied upon the testimony of Jim Hines, manager control systems division, facilities management, University of Nebraska.

cian.” Baumli’s actual employer, Advantage Personnel, was paid for Baumli’s services. Advantage Personnel is owned by Neeman’s mother. On May 27, 1996, Baumli became a direct employee of Respondent. No actual job vacancy was advertised. At some point after converting to employee status, Baumli was assigned “ladder rack” installation work. I have already found that each of the 8 applicants was qualified to perform this work.

Baumli’s prior experience included 6 months as an electro-mechanical technician responsible for maintenance of two gas turbine generation facilities, 6 years with Nebraska Public Power District including over 2 years as an “As-Built Draftsman,” just under 2 years as an electrician, and 1 year as gas turbine technician. He also listed experience as ground crew foreman responsible for coordinating work on utility pole inspection and retreatment. He had an associate degree in electrical technology and a bachelor’s degree in industrial technology and business administration.

All of the applicants had considerably more experience than Baumli in electrical work. For instance, Munch has worked as a journeyman electrician since 1960. Roussan became a journeyman in 1966 and worked as a journeyman electrician until 1995 when he became assistant business agent and organizer. Pelley, Chorowicz,¹⁴ Burge,¹⁵ and Rich¹⁶ completed IBEW apprenticeship training in 1973 or 1974 and, with the exception of Pelley, have worked as journeyman electricians since that date. Pelley ceased working as a journeyman electrician in 1987 when he became business manager and financial secretary of the Union. Pelley performed ladder rack work occasionally, as did all electricians. For a period of 4 months, Pelley performed exclusively as a ladder rack installer. Davids¹⁷ became a journeyman electrician in 1989 and Codr¹⁸ became a journeyman electrician in 1993.

I find that Respondent had a job vacancy on May 27, 1996, and it has not shown that it would have hired Baumli on May 27, 1996, over the other applicants. Because the number of qualified applicants (8) exceeds the number of available jobs (1), a backpay and instatement remedy is appropriate for only one of the applicants. The compliance proceeding is the appropriate forum for determining which of the 8 applicants must be offered backpay and instatement for this position.¹⁹

¹⁴ Chorowicz had been a foreman at Commonwealth Electric since July 1992. Although he stated that it was possible he might not have accepted any job depending on the pay, he modified this position by limiting the answer to minimum wage or above. He stated that he would have accepted any job in order to organize the employees. I do not find that Chorowicz removed himself from consideration for employment by making these statements.

¹⁵ Burge has worked for Commonwealth Electric for 10 years and at the time of the hearing was a foreman.

¹⁶ At the time of the hearing, Rich was a service technician with Commonwealth Electric. He had occupied that position since July 1987.

¹⁷ Davids has worked at ABC Electric since 1988 and at the time of the hearing was job foreman.

¹⁸ Codr worked at ABC as a job foreman at the time of the hearing.

¹⁹ See *FES*, 331 NLRB at 14.

4. Electricians—January 1997

On January 21, 1997, Respondent advertised for “part-time Apprentice Electrician, 3 years experience required, with 2 years in Commercial/Industrial applications.” On January 23, 1997, a similar advertisement for “part-time Apprentice Electrician” stated, “Commercial Experience Mandatory.” On January 27, 1997, Respondent hired Jamie Clarke as an “electrician” at a rate of \$9.50 per hour, and Frank Nuno as an “electrician” at a rate of \$9 per hour. Clarke listed 4 years of experience as an apprentice electrician with some commercial experience. Nuno listed 3 plus years experience as an apprentice electrician with some experience installing new electrical equipment in a high school. No specific reference to commercial experience is made in his job history or resume.

On March 5, 1997, Respondent advertised for “Full-time Apprentice Electrician, 2+ Years Commercial Experience mandatory.” On March 10, 1997, Respondent hired Greg Simons as an “electrician” at an initial rate of \$10 per hour. Simons listed about 5 years experience as an apprentice electrician in commercial, residential, and industrial areas.

I find that Respondent has not shown that it would have hired Clarke, Nuno, and Simons over the other applicants. None of the successful applicants possessed the experience of the 8 applicants.²⁰ Moreover, none of the successful applicants had the depth of skill of the 8 unsuccessful applicants. Because the number of qualified applicants (8) exceeds the number of available jobs (3), a backpay and instatement remedy is appropriate for only three of the applicants. The compliance proceeding is the appropriate forum for determining which of the 8 applicants must be offered backpay and instatement for these positions.²¹

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The appropriate remedy for failure to consider the applicants includes consideration for future openings in accord with nondiscriminatory criteria. Because I have already performed this consideration for a one-year period following the initial unlawful refusal-to consider and found that there were 7 actual job losses, it is unnecessary to defer this to the compliance proceeding and it is unnecessary to order consideration for future openings. It is similarly unnecessary to order Respondent to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions. With regard to the refusal-to-hire violations, the compliance proceeding is the appropriate forum for determining which of the 8 discriminatees must be offered backpay and instatement for the 7 available jobs. Respondent must offer

²⁰ Had the job openings been advertised as “electrician” rather than “apprentice electrician” vacancies, I would be inclined to exclude Roussan and Pelley from consideration because their most recent experience was somewhat dated. However, because the jobs were advertised at the apprentice level, Roussan and Pelley’s absence from the field would not be detrimental.

²¹ See *FES*, 331 NLRB at 14.

those discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and must make them whole for losses sustained by reason of the discrimination against them. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The Respondent, Progressive Electric, Inc., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of its facility if they select the Union as their exclusive collective-bargaining representative, threatening employees with loss of employment if they engage in activities on behalf of the Union, soliciting employees to speak to other employees in opposition to the Union, instructing employees to reject solicitations by the Union, soliciting employees to distribute a letter in opposition to the Union and union activities of other employees, and suggesting the form of this communication, and informing employees that their annual reviews were delayed as a result of their activities on behalf of the Union.

(b) Changing its hiring procedures by refusing to allow submission of applications by telling prospective applicants they will be contacted for future vacancies, by requiring telephone contact prior to taking an application and by placing blind ads concealing its identity and limiting the time for filing of applications and failing and refusing to consider applicants for employment and failing and refusing to employ them because of their Union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) As determined in a subsequent compliance proceeding, instate Clinton Burge, Don Davids, Meryl Rich, Fred Munch, Robert Codr, Jerry Chorowicz, Bill Roussan and Jim Pelley to the 7 available positions for which they attempted to apply or, if those positions no longer exist, to substantially equivalent positions, and make them whole for losses sustained by reason of the discrimination against them as determined in a subsequent compliance proceeding.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary

to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Lincoln, Nebraska, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 29, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated San Francisco, CA, August 23, 2000.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with closure of our facility or loss of employment if you select International Brotherhood of Electrical Workers Local Union No. 265, affiliated with International Brotherhood of Electrical Workers, AFL-CIO, as your exclusive collective-bargaining representative; WE WILL NOT solicit you to speak to other employees in opposition to the Union or to distribute a letter in opposition to the Union; WE WILL NOT instruct you to reject solicitations by the Union; and WE WILL NOT tell you that we have delayed your annual reviews because of activities on behalf of the Union.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²³ If this order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

WE WILL NOT change our hiring procedures by refusing to allow you to file an application but telling you we will call you when a vacancy occurs, by requiring telephone contact prior to taking an application, and by placing blind ads concealing our identity and limiting the time for filing of applications and WE WILL NOT fail and refuse to consider applicants for employment or to employ applicants because of their Union affiliation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights pursuant to Section 7 of the Act.

WE WILL make whole Clinton Burge, Don Davids, Meryl Rick, Fred Munch, Robert Codr, Jerry

PROGRESSIVE ELECTRIC, INC.